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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 227

UNITED MINE WORKERS OF AMERICA, ET AL.,
Petitioners,

versus

ARKANSAS OAK FLOORING COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

BRIEF FOR RESPONDENT.

GROVE STAFFORD,
710 Guaranty Bank Building,
Alexandria, Louisiana;
JOHN L. PITTS,
710 Guaranty Bank Building,
Alexandria, Louisiana;
RICHARD C. KEENAN,
1113 Whitney Building,
New Orleans, Louisiana,
COUNSEL FOR RESPONDENT.

Montgomery & Co., "The Brief Specialists", 430 Chartres St., N. O., La.

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QUESTIONS PRESENTED FOR REVIEW.

Respondent is dissatisfied with petitioners' presentation of the questions for review and submits that a more proper presentation is as follows:

The picketing involved herein was by a union which had never theretofore been recognized as the majority representative of the employees of respondent, nor certified as such by the National Labor Relations Board, and which had made such certification impossible by, **as a matter of continued policy,** refusing to comply with the provisions of Sub-Sections (f), (g) and (h) of Section 9 of the Labor Management Relations Act of 1947 as amended. The picketing had for its object the obtaining of recognition of the union by respondent as collective bargaining representative of its employees.

1. Is recognition picketing by such a union under such circumstances made an unfair labor practice by the Act, thus precluding state regulation?

2. Apart from the question of whether individual employees are protected from discriminatory employer action in such a case, does the Act preclude state regulation of recognition picketing by such a union?

3. Even though the Labor Management Relations Act may not preclude state regulation of such picketing, is it protected by Articles I and XIV of the United States Constitution?

By stating, in their presentation of questions for review, that the picketing was that of "a majority desig-

nated union representative", petitioners beg one of the basic questions involved in the case. It was precisely for the reason that the petitioning union made it impossible for the National Labor Relations Board to determine the validity of its **claim** to majority designation that the injunction against picketing was issued.

ARGUMENT.

1. Action of Court Below Not Unconstitutional.

The Supreme Court of Louisiana found the conduct of petitioners to be unlawful in that State. The Court held:

> "It necessarily follows that inasmuch as the Union in the instant case has, by its own admission and as certified to by the National Labor Relations Board, failed and refused to comply with the provisions of Sections 9 (f) (g) and (h) of the 1947 amendment, the Board is without jurisdiction to entertain any question with respect to its protestations of majority representation and/or unfair labor practices, for it is not only ineligible for certification, but cannot compel the employer to recognize it as the representative of its employees. The plaintiff's refusal to recognize the Union was, therefore, not in violation of any obligation imposed by law, and the picketing in furtherance of this unlawful objective was the employment of economic pressure illegally for the purpose of causing the employer irreparable injury for which it has no adequate administrative or legal remedy—injurious conduct which the state has jurisdiction to relieve. See, Stewart-Warner Corp. v. National

Labor Relations Board, 194 F. (2d) 207;" Goodwins, Inc., v. Hagedorn, 303 N. Y. 300, 101 N. E. (2d) 697; Fulford v. Smith Cabinet Mfg. Co., 118 Ind. App. 326, 77 N. E. (2d) 755; Cordey China Co. v. United Mine Workers of America, 25 N. J. Super. 514, 96 A. (2d) 696; and Simmons v. Retail Clerks Union Local 770, 14 Labor Cases 73,335." (R. 80-81).

Petitioners argue, in effect, at Page 22 of their brief, that the court below made no finding of violation of State law or public policy, but that the court found the conduct to be unlawful because of violation of the National Labor Relations Act. Reference to the Court's opinion demonstrates the fallacy of this contention. The Court below could not have been more emphatic in its finding that no violation of that Act was involved. The Louisiana Supreme Court said:

"In the instant case the picketing was engaged in for the sole purpose of compelling the employer to recognize as the legally constituted agent of its employees a union that has no legal status before the National Labor Relations Board because of its failure and refusal to comply with the provisions of the Act requiring the filing of certain information relative to structural and financial matters, as well as non-communist oaths. This is clearly not an act denounced as an unfair labor practice by the amendment of 1947." (R. 73-74).

It is true that the Court, in its opinion, explored in great detail the possibility of remedy before the National Labor Relations Board, and into the ability and

authority of the Board to act in the matter. The Court had before it the then recently decided case of *Garner v. Teamsters Union*, 346 U. S. 485, 98 L. Ed. 228, 74 S. Ct. 161, wherein state courts were enjoined not to enter upon fields where Congress had afforded relief through the processes of the National Labor Relations Board. The Louisiana Supreme Court had to decide the availability of federal relief before it could even consider the question of state law violation. That the Louisiana Supreme Court was correct in its approach was demonstrated by subsequent decisions of this Court. In *Weber v. Anheuser-Busch*, 348 U. S. 468, 99 L. Ed. 386, this Court, in reference to a portion of its opinion in the *Garner* case said:

> "By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories the areas that have been preempted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in Garner v. Teamsters, C. & H. Local Union (U. S.) supra. But as the opinion in that case recalled, the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.' 346 U. S. at 488. This penumbral area can be rendered progressively clear only by

the course of litigation. Regarding the conduct here in controversy, Congress has sufficiently expressed its purpose to bring it within federal oversight and to exclude state prohibition, even though that with which the federal law is concerned as a matter of labor relations be related by the State to the more inclusive area of restraint of trade.

"We realize that it is not easy for a state court to decide, merely on the basis of a complaint and answer, whether the subject matter is the concern exclusively of the federal Board and withdrawn from the State."

And in *Amalgamated Clothing Workers of America v. Richman Bros.*, 99 L. Ed. 422, this Court emphasized that it was the responsibility of **state courts** initially to determine the "not easy" decision as to what had been withdrawn from them by federal legislation saying:

"Neither the proceedings in this case, nor the history of state court actions since the decision in Garner v. Teamsters, C. & H. Local Union, 346 U. S. 485, 98 L. Ed. 228, 74 S. Ct. 161, demonstrate recalcitrance on the part of state courts to recognize the rather subtle line of demarcation between exclusive federal and allowable state jurisdiction over labor problems. In its effort to define what has been withdrawn from the States and what has been left them, the opinion in Garner, decided just last Term, was hedged with qualifications, even in a case which dealt only with state court enforcement of a state labor policy as such."

The Court finally concluded:

> "In any event, if resort to a state court may not be circumvented by the power of the Board to entertain such a complaint, we are bound to repeat that, insofar as a penumbral region must remain between state and federal authority touching industrial relations until finally clarified by definitive rulings here or further legislation by Congress, state litigation must, in view of § 2283, be allowed to run its course, including the ultimate reviewing power in this Court."

The Louisiana Supreme Court, having concluded that the federal legislation did not preclude its action, proceeded to conclude that the picketing "was the employment of economic pressure illegally for the purpose of causing the employer irreparable injury for which it has no adequate administrative or legal remedy—injurious conduct which the state has jurisdiction to relieve." (R. 80). If the Louisiana Supreme Court was correct in its conclusion that federal legislation did not preclude its action, there is no question of its right to take the action it did. This Court has made itself clear that the Constitution does not preclude a state from enforcing by a ban on picketing, a public policy, whether declared in its statute or in the opinion of its highest court, such as Louisiana has enforced in this case. *Giboney v. Empire Storage and Ice Co.*, 336 U. S. 490, 93 L. Ed. 834, 69 S. Ct. 684; *Hughes v. Superior Court*, 339 U. S. 460, 94 L. Ed. 985, 70 S. Ct. 718; *International Brotherhood v. Hanke*, 339 U. S. 470, 94 L. Ed. 995; *Building Service Employees International Union v. Gazzam*, 339 U. S. 532, 94 L. Ed. 1045.

2. The Conduct Enjoined Was Not An Unfair Labor Practice.

All of the unfair labor practices which may be committed by a union are enumerated in the sub-Sections of Section 8 (b) of the Labor Management Relations Act of 1947. The conduct enjoined herein was not restraint or coercion of an employer in the selection of the person to do his negotiating for him (Section 8 (b) (1) (B)), an attempt to cause or the causation of discrimination (Section 8 (b) (2)), a union refusal to bargain (Section 8 (b) (3)), a secondary boycott (Section 8 (b) (4) (A) and (B)), a strike against a current Board certification (Section 8 (b) (4) (C), a jurisdictional dispute (Section 8 (b) (4) (D)), the imposition of excessive dues or initiation fees (Section 8 (b) (5)), or featherbedding (Section 8 (b) (6)).

The leading case treating with the right of a state to enjoin recognition picketing engaged in prior to determination by the NLRB of the majority representative is *Goodwins v. Hagedorn*, 303 N. Y. 300, 101 N. E. (2d) 697 (N. Y. Ct. App., 1951). As to the possible application of Section 8 (b) of the National Labor Relations Act the Court of Appeals for New York said:

> "Nor does the Federal Labor Management Relations Act (as we see it) disable our State courts from acting in the circumstances of this case. For one thing, the activity of the defendant union is not within any of the categories of union unfair labor practices denounced in subdivision (b) of section 8 of the Federal statute (U. S. Code, tit. 29, § 158). The provisions of the Federal stat-

ute that come closest to touching this case are contained in paragraph (4) of subdivision (b) of section 8 which says that it shall be an unfair labor practice for a labor union or its agents to 'engage in, or to induce or encourage the employees of any employer to engage in, a strike * * * where an object thereof is: * * * (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees * * *; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees'. The picketing conducted by the defendant union does not fall within the foregoing definitions of unfair labor practices under the Federal act because, as we have already noticed, no strike is involved in this case and no union has yet been certified as exclusive collective bargaining agent for the employees in question. Thus this aspect of the case presents no question of conflict with the Federal statute."(1)

Petitioners urge, citing *Weber v. Anheuser-Busch*, that respondent, in the trial court, alleged an unfair labor practice by the inclusion in its petition for injunction of the following allegation:

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(1) For a New York Supreme Court, appellate division, case holding that the decision in **Goodwins v. Hagedorn** has not been impaired by the subsequent rulings of the Supreme Court of the United States see **Baylis v. Quinnonez**, 145 N. Y. Supp. (2d) 232 (October 24, 1955).

> "Petitioner shows that the picketing presently engaged in by the defendant union has for its unlawful purpose the forcing of petitioner to interfere with the rights of its employees as expressed by the legislature of Louisiana, by requiring petitioner to deal with the defendant union as a representative of its employees in the absence of their selection of said union as their representative." (R. 4).

Petitioners do not say what sub-section of Section 8 (b) of the Act is alleged to have been violated, and nowhere in the petition for injunction is there an averment or conclusion that any violation of any sub-section of Section 8 (b) has occurred. This is a far cry from the *Weber* case where the complaint contained the specific allegations ". . . .that the strike constituted a 'secondary boycott under the common law of the State of Missouri,' and was also a violation of sub-sections (A), (B) and (D) of Section 8 (b) (4) of the Taft-Hartley Act and of Section 303 (a) (1), (2) and (4) of the same act." Nor is the language of paragraph 10, quoted above, susceptible of a construction that would spell out an unfair labor practice.

Petitioners, at page 28 of their brief, have sought to draw a parallel between the conduct complained of in *Garner* and the quoted allegation. No such parallel is possible. The Supreme Court of Pennsylvania in its opinion (373 Pa. 19, 94 A. (2d) 833) found that the picketing in *Garner* was in violation of Section 8 (b) (2) in that it was designed to "attempt to cause or cause an employer to discriminate against an employee in violation of sub-Section 8 (a) (3) of this Section . . .", and pointed

out that Section 8 (a) (3) prohibited discrimination in regard to hire or tenure of employment because of union membership or lack of it. Thus *Garner* involved a case where the union was attempting to get an employer to have his employees join the union or fire them. Nothing like this is alleged here. The allegation is that the union is attempting, by picketing, to obtain certification without having been properly designated as majority representative. There is no allegation of coercion of employees, and no allegation that the union attempted to cause the employer to discriminate.

It might be urged that the allegation in the quoted paragraph described an attempt upon the part of the union to cause the employer to violate Section 8 (a) (1) of the Act. Even if acquiescence with the union's demands would have amounted to a violation of Section 8 (a) (1) by the employer, **it is not made an unfair labor practice for a union to cause an employer to violate Section 8 (a) (1) of the Act.** *Miami Copper Company*, 92 NLRB 322 (1950).

There remains for consideration, therefore, whether Section 8 (B) (1) (A) of the Act makes unlawful peaceful picketing for recognition.

In *National Maritime Union of America*, 78 NRLB 971 (1948), the Board, beginning at page 982 of its opinion, engaged in an exhaustive review of the legislative history of Section 8 (b) (1) (A) of the Act. The Board commented:

> "The words 'to interfere with' were deleted from the amendment with the consent of Senators Ball and

> Taft, after Senator Ives had expressed the fear that these words 'could easily be construed to mean that any conversation, any persuasion, any urging on the part of any person, in an effort to persuade another to join a labor organization, would constitute an unfair labor practice."

The Board concluded that Section 8 (b) (1) (A) was aimed at the means by which a strike was conducted (Board opinion, page 986). And in the *Matter of Perry Norvell Company*, 80 NLRB 225 (1948), the Board, citing its *National Maritime* case, stated:

> "Assuming, arguendo, the validity of the premises upon which the General Counsel has based his argument, the conclusion does not follow that the strike violated the Act.[24] Section 8 (b) (1) (A) was not intended to have the broad and almost limitless reach which the General Counsel urges upon the Board. The legislative history of the Act shows that, by this particular section, Congress primarily intended to proscribe the **coercive conduct** which sometimes accompanies a strike, but not the strike itself.[25] By Section 8 (b) (1) (A), Congress sought to fix the rules of the game, to insure that strikes and other organizational activities of employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force, or of economic reprisal.[26] In that Section, Congress was aiming at means, not at ends."

The Fourteenth Annual Report of the National Labor Relations Board for the year 1949 contains at page 83, this statement:

> "In several cases it was urged by the General Counsel that calling certain types of strikes allegedly prohibited under other subsections of Section 8 (b), or the threat to do so, also constituted proscribed union activity within the meaning of subsection (1) (A). The Board rejected this contention, on the ground that this portion of Section 8 (b) was designed only to curtail acts of coercion and violence that sometimes may accompany a strike, but not the very strike call itself."[22]

And in *Local 74, United Brotherhood of Carpenters and Joiners*, 80 NLRB 533, 539 (1948) the Board held that a union "did not violate Section 8 (b) (1) (A) of the Act, (1) by peacefully picketing Watson's own store at a time when Local 74 represented none of its employees. . . ." Thus, even stranger picketing does not, in view of the Board, violate the Act it administers.

Nor, in the view of the Board, would the circumstance that acquiescence to the union's demands might cause an employer to commit an unfair labor practice make the union's conduct illegal under the Act. In *Miami Copper Company, supra*, a case dealing with picketing by a non-certified union the Board said:

> "Standing alone, the fact that the Union's conduct caused the Employer to violate a statutory right of the employees is not sufficient, in our opinion, to bring that conduct within the limitations which the legislative history requires we place on Section 8 (b) (1) (A)."

The Board has also treated with recognition picketing conducted by a non-complying union in connection

with alleged violations of Section 8 (b) of the Act. In *Rubin Bros. Footwear, Inc.*, 99 NLRB 610, 619 (1952), the question as to whether a strike for bargaining rights by a non-complying union violated the Act was raised as defense in a refusal to bargain case brought by a union against the employer. The Board, in passing on the question raised in this matter, adopted the following language of the Trial Examiner's intermediate report:

> "Respondents seem to contend, in the instant matter, that the strike was illegal and void and consequently an unprotected activity by its employees since it was called because of Respondents' failure to recognize the United Shoe Workers of America, C. I. O., and was called at a time when said Union was not in compliance with Section 9 (h) of the Act. The undersigned finds no authority to support this contention. The undersigned has found no authority holding a strike under these circumstances is per se unlawful. Furthermore, in the light of the entire Act and its legislative history it does not appear that Congress intended such an interpretation of the statute even though the Union could not use the processes of this Board to enforce its demands prior to its compliance with Section 9 (h) of the Act."

The Board, and its General Counsel, have made it abundantly clear that no relief whatsoever can be obtained through Board processes from the crippling effects of a primary recognition strike, even though the strike activity be unprotected by the provisions of the Act. The most recent administrative decision in this regard is quoted below:

"Par. 53,365 Administrative Decision of the General Counsel, Case No. K-101, November 3, 1955,

Unfair Practice Charge—Strike for Immediate Election.

"While a union petition for a representative election was pending, union requested the company to agree to an immediate election. When the company rejected this proposal, the union struck the plant and set up a peaceful picket line. The company filed a charge, alleging a violation of Section 8 (b) (1) (A) of the Act.

"The General Counsel concluded that further proceedings under Section 8 (b) (1) (A) were unwarranted. Whether or not the conduct of the union constituted activity protected under Section 7 (see, e. g., Hoover Co. v. N. L. R. B., 191 F. (2d) 380 (C. A., 6) and N. L. R. B. v. Electronics Equipment Co., 194 F. (2d) 650 (C. A., 2)), the strike and picketing herein did not violate Section 8 (b) (1) (A). (See Perr Norvell Co., 80 NLRB 235, 238-241, where the Board held that Section 8 (b) (1) (A) proscribes 'the coercive conduct which sometimes accompanies a strike, but not the strike itself.' Also, see Miami Copper, 92 NLRB 322, 324; Watson Specialty Store, 80 NLRB 533, 539; and UAW v. O'Brien, 339 U. S. 454, 458. Also, see Senate Report No. 986, Part 3, 80th Congress, Second Session, pp. 70-72, wherein the Joint Committee on Labor-Management Relations, in commenting on the 1947 amendments to the Act, observed, in part, that 'the right to strike for recog-

nition is only foreclosed when another labor organization has been certified as the bargaining representative.)"

A good summary of the position of the Board and the General Counsel in this regard is found in an address given by the former General Counsel of the National Labor Relations Board before the Arkansas Bar Association on May 13, 1954:

"Another interesting and difficult question arises in connection with organizational or recognition strikes in circumstances where the union is not the clear representative of the majority of the employees. Thus, for example, assume that two unions are vying for recognition as the exclusive bargaining representative of a given group of production and maintenance employees. Both conduct vigorous campaigns to win majority support among the employees; each has substantial support among the employees as evidenced by the signatures of employees to union cards; indeed, there are overlapping cards, some employees signing cards for one union one day and for another union the next day. In this not unusual situation the Board has held the employer is duty bound to withhold recognition from either union until the employees have made a choice in an election conducted by the Board. Suppose, however, that one of the two unions strikes for immediate recognition. It has been held that such a strike is not a protected activity; it is designed to compel the employer to grant what it is his duty to withhold and thus to implicate him in a

wrong. Hoover Co. v. N. L. R. B., 191 F. (2d) 380 (6th Cir., 1951); N. L. R. B. v. Electronics Equipment Co., 194 F. (2d) 650 (2nd Cir., 1952). But neither, as I see it, is the strike prohibited by the National Labor Relations Act as an unfair labor practice. Bogalusa Motors, Inc., Case No. 15-CB-117, Administrative Appeal denied Feb. 19, 1954. **Congress has seen fit to make only one form of direct recognition strike unlawful as an unfair labor practice, namely, a strike for recognition by one union in the face of the Board's certification of another union as the exclusive bargaining representative.** And this is not an area, in my view, in which as administrators we are free to innovate. Many proposals have been advanced in Congress to prohibit other forms of recognition strikes; much discussion pro and con has taken place, but Congress has not yet seen fit to act. We cannot rush in, it seems to me, where Congress has been so conspicuously reluctant to tread. 34 Lab. Rel. Rep. 67 (1954)." (Emphasis supplied).

It is submitted, therefore, that under no section of the National Labor Relations Act is the conduct here involved made a union unfair labor practice. But, in the words of the Labor Board, "to say that a strike is not violative of Section 8 (b) (1) (A) is not necessarily to say that it constitutes a concerted activity protected by Section 7." *National Maritime Union of America, supra,* at page 987 of the opinion.

3. Picketing By A Non-Complying Union For Exclusive Recognition Is Not Protected by the Act.

The petitioning union is a labor organization which, as a matter of policy, has purposely refused to have its officers file non-communist affidavits, and to give proof of financial disclosures to its members, as required by the Act. This is no case of an inadvertent or temporary failure to comply. To the contrary the petitioning union, in requesting a writ of review, openly and avowedly seeks the Court's approval for the continuation of what it calls its "self-help" method of organization. To put it another way, the petitioning union desires to be free to compel recognition by the effect of the picket line, rather than to have recognition awarded to it after orderly election processes in accordance with law.

The petitioner, United Mine Workers, flatly takes the position that the Labor Management Relations Act grants or "protects" a non-complying union's right to strike and picket an employer for recognition. Respondent as strongly denies that the Act grants any such right. Our reasoning is that to grant such protection to a non-complying union would be to place a premium upon its non-compliance, which certainly was never intended by Congress.

Section 9 (g) of the Act provides:

> "(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file

> with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). * * *"

This is a flat, unequivocal directive to all labor unions representing employees engaged in interstate commerce. Petitioner does not deny this, because it is expressly so provided in the Act, but it says that it does not have to comply because the only penalty provided by Congress is to deny a non-complying union the processes of the board in representation and unfair labor practice matters. It is our thought that Congress failed to provide a harsher penalty for non-compliance simply because it was convinced that the named penalty would do the job and bring all unions to comply. It has had this effect in the great majority of cases, but, strange to say, the petitioning union has adopted a definite and studied policy of circumventing the Board and, in effect, taking the law into its own hands.

The National Labor Relations Act, as amended, affords protection to unions engaged in peaceful strikes and picketing for recognition, but, as we read the Act, only to those unions which make themselves amenable to its processes (Section 9 (f) (g) and (h)). Thus, the petitioning union has made it impossible for the National Labor Relations Board either to certify it as a majority representative of its employees, or to order an employer to bargain with it either with or without certification. Petitioner has no remedy with the Board, the body charged with affording to unions the Act's protection. By adhering to a policy of non-compliance the petitioning union, it is submitted, has waived any right to the Act's protection.

Petitioners, at page 14 of their brief, urge that:

> "No limitation upon the right of a union to represent employees arises from a failure to file in accordance with the provisions of Section 9 (f) (g) and (h)."

While it is true that the Act does not make voluntary recognition of a non-complying union unlawful, it does place such a union in a position so as not to be able to compel recognition, and in certain important particulars, contrary to the statements of petitioners, has placed restrictions upon such a voluntary bargaining relationship.

The proviso to Section 8 (a) (3) [29 U. S. C.; 158 (a) (3)] permits the execution of a contract with a labor organization, requiring membership in the union after a 30 day waiting period. This permission is subject to these qualifications:

> "Section 158 . . . (3) . . . (i) if such labor organization is the representative of the employees as provided in Section 159 (a) of this title, in the appropriate. collective-bargaining unit covered by such agreement, when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159 (f), (g), (h) of this title, and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: . . ."

Thus a non-complying union is subject to one of the most severe restrictions which the law could place upon a labor organization. One need only to read the newspapers, in their reports of activities in connection with state right-to-work laws, to learn how important union security is to organized labor. Obviously this limitation upon the freedom to contract is more onerous to the union party to the agreement than to the employer. But it is no answer to say that only unions desire, and can benefit by union security agreements. There is no unanimity of opinion among employers as to bans upon union security. Many employers, particularly in the construction and maritime industries, have given evidence of a preference for tight union security. Can it be said that an Act which so severely curtails a non-complying union in its efforts to bargain collectively, affords protection to its picketing to compel entrance into such a limited bargaining relationship? Did Congress intend that an employer, who might desire the stability of labor relations that a union security agreement gives should, without any redress, either contract with such a restricted organization, or stand the crippling effects of a picket line?

And there is another limitation or restriction to which any voluntary bargaining relationship between a non-complying union and an employer is subject. Even though there be no dispute between an employer and a complying labor organization as to the appropriateness of the bargaining unit or as to majority status of the union either the union or the employer may set in motion the machinery of the Board and have the union status as majority representative of the employees ratified by the

Board by the issuance of a certification. This is an extremely important matter. The Act provides:

> "Section 158 . . . (b) it shall be an unfair labor practice for a labor organization or its agents . . . (4) to engage in . . . a strike . . . where an object thereof is . . . (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title."

It is thus plain that only by contracting with a certified organization may an employer be free from labor disturbances resulting from claims of rival unions. It is not enough to say that under the Board's contract bar rules an election cannot be forced during the term of a contract of reasonable duration. Unless the contracting union is also the certified union any other union may strike or picket for recognition without committing any unfair labor practice under the federal Act. In the first case arising since the 1947 amendments, in which the Board proceeded to certification where the union was already recognized was *General Box Company*, 82 NLRB 678 (1949). The Board engaged in a very complete discussion of the problem:

> "These statutory privileges and immunities that accompany certification are not the only significant advantages that accrue to certified unions, as distinguished from those that enjoy recognition without certification. Under the so-called 'one-year rule' enunciated by the Board long before the

1947 amendments were enacted, a certified union's right to recognition as the exclusive bargaining agent is stabilized and fully protected for a 'reasonable' period of time, ordinarily one year from the date of certification. This rule operates to limit the freedom of the employees to select and change their bargaining representative at will, once they have selected a union in a secret ballot conducted by the Board;[10] it derives from the statutory policy of encouraging and stabilizing collective bargaining in the interest of industrial peace;[11] it endows a **certified** union's status with a measure of security and permanence not enjoyed by a union whose majority standing and right to recognition is established otherwise than by Board election and certification.

'For example, although an uncertified union may prove its majority to the employer's satisfaction, properly secure recognition and negotiate with the employer for many months, the successful completion of this collective bargaining effort may be frustrated. If, at the eleventh hour before a contract is signed, a rival union, or employees seeking to 'decertify'[12] the merely recognized union, assert that its majority is dissipated and file a petition with the Board, the employer may not lawfully execute a contract until the Board has disposed of the petition.[13] But if the union has a vital **certification,** neither the employer himself nor a rival union, nor the employees, can effectively raise a question of representation;[14] and if a contract otherwise valid is signed or renewed within the cer-

tification year, even in the face of a petition, it will bar an election for its term.[15] In short, under the 'one-year rule,' a Board certification not only resolves any dispute as to the employer's duty to recognize and bargain with the certified union; it also precludes other possibly interested parties from raising a question of representation, and for a definite period of time.

"In enacting the 1947 amendments, Congress left unchanged the Board's practice of according this special value to certifications. Moreover, it greatly expanded and implemented the protection of certified unions in Section 8 (b) (4), and restated the statutory policy of stabilizing collective bargaining relationships in the public interest. It would be a retrogressive step tending to defeat that basic policy to hold that an employer's willingness to recognize and bargain with a union makes it impossible for the union to secure the other manifest advantages which flow from a Board certification. **In many instances, indeed, it is the employer—although concededly not this one—who seeks these advantages and particularly those conferred by Section 8 (b) (4) (c).**

"For these reasons, as well as those more fully stated in the Advance Pattern case, we conclude that, in view of the 1947 amendments, an employer's recognition of a union which asserts representative status does not, in and of itself, negate the existence of a question concerning representation. In this case, we are of the opinion that there is such a question, created by the Pe-

titioner's assertion of majority standing, its expressed desire to secure a certificate, and its formal petition that the Board investigate its status by the statutory method of conducting an election.[16]

"The concurring opinions of our colleagues propose that the Board certify the Petitioner here without an election, apparently after some other type of investigation of its majority status. **Aside from the fact that such a procedure might well stimulate collusion and raise more problems than it would solve, we must point out that the 1947 amendments deprived the Board of the power to certify without an election."** (Emphasis supplied).

In *Lock Joint Pipe Company*, 106 NLRB 355 (1953), the Board recently had occasion to direct an election, upon the petition of an employer, where the union was already recognized but the employer felt the need of having stabilized labor relations with a certified union.

There is an inconsistency that runs through petitioners' entire position. It asserts it was a majority designated union and further asserts that respondent was under a duty to bargain with it in absence of any certification by the National Labor Relations Board. What respondent overlooks is that only the National Labor Relations Board can determine whether petitioners were the majority designated union, or where there was any duty upon the part of respondent to bargain with the union. Whether the Board determines the duty to bargain by its election processes, or whether it determines this duty to bargain in a complaint proceeding brought under Section

10 (b) of the Act only the Board can, under the law, initially decide whether a majority existed or whether respondent had a duty to bargain. **Petitioners by adopting non-compliance as a matter of policy have made it impossible for the Board to determine majority, in any fashion, or to determine the duty to bargain.** The Louisiana Supreme Court discussed this: "Shortly after the passage of the 1947 amendment to the Act, in the matter of *Herman Loewenstein, Inc.*, 75 NLRB 377, the National Labor Relations Board had occasion to consider and interpret the provisions of Section 9 (f) (g) and (h) and it there laid down a policy from which it has never since deviated. Although in that case the matter had been brought to the Board by the employer, the Board, in refusing to take jurisdiction, said:

> *'We construe the amended Act to provide, in essence, that a non-complying labor organization shall not be the beneficiary of any Board investigation of a question concerning representation.* For this reason the Board has declined to proceed to hearing or election on a petition filed by a non-complying union; it has declined to certify such a union since the effective date of the amendments to the Act, even though it won a victory at the polls before that date; it has declined to place such a union on the ballot, as intervenor, in an election held at the instance of a petitioning labor organization that has complied with Sections 9 (f) and (h), even though its intervention at the hearing was otherwise proper; and *it has declined to order an employer to bargain collectively with a noncomplying union*, except upon compliance by the union within a specified period.

'Here the petitioner is not a complying labor organization, but the employer. The fact remains that the question concerning representation, although brought to the Board's attention by the employer's own petition, was 'raised by a labor organization.' It was raised by the affirmative claim, here made both by the Fur Workers, CIO and by the Adirondack Workers, that a labor organization represented a majority of the employer's employees within an appropriate unit. * * * *Although it is the employer's petition in such a case that sets the Board's machinery in motion, it is an individual's or a labor organization's initial claim for recognition that makes it possible for the employer to invoke that machinery.* If, as here, a labor organization that presented a claim for recognition has not complied with the provisions of Section 9 (f) and (h), we would no more implement the policy of Congress if we placed it on the ballot than if we were to do so in a case in which it, or another labor organization, filed the formal papers with the Board. *If a non-complying union were placed on the ballot and happened to win the election, no one could expect the Board under the amended Act to issue a certification that would run in its favor.* But a victory at the polls, even without later formal certification, would confer certain moral and practical advantages on the non-complying union which the basic policy of Congress appears to discountenance. Such a result can be averted with certainty only by our declining to place a non-complying union on any ballot,

PROOF OF SERVICE.

I hereby certify that I have deposited in the United States Mail, with sufficient air mail postage thereon insured delivery, copies of the foregoing brief and argument addressed to all counsel for United Mine Workers of America, et al., petitioners, one copy being addressed to Honorable Crampton Harris, 1018-19 First National Bank Building, Birmingham 3, Alabama; one copy to Honorable James I. McCain, 818 Whitney Building, New Orleans, Louisiana; one copy to Honorable Yelverton Cowherd, 900 Fifteenth Street, N. W., Washington 5, D. C.; and one copy to Honorable Alfred D. Treherne, 900 Fifteenth Street, N. W., Washington 5, D. C., on this ..... day of January, 1956.

I further certify that I have placed in the United States Mail, three copies of the foregoing brief and argument, addressed to the Solicitor General, Department of Justice, Washington 25, D. C., with postage thereon fully prepaid to insure delivery, on this ..... day of January, 1956.

JOHN L. PITTS.

unless there are absolutely compelling statutory or policy reasons for doing so.

In our opinion, *the fact that a petition has been filed by an employer rather than by a labor organization does not provide such compelling reasons.* The question concerning representation remains a question 'raised by a labor organization' which has made a claim for recognition as bargaining representative. An employer petition, like a union petition, seeks to resolve the question of who, if anyone, is the true bargaining representative of the employees. Either sets in motion the same investigative process; the same result, either of certification or of dismissal, may flow from either; and a Board election conducted on the basis of either will now preclude another Board election for 12 months. This similarity between employer and union petitions, both in purpose and in result, points strongly to the conclusion that a non-complying union should derive no more advantage from the one than it does from the other. The statutory language supports the same conclusion. Sections 9 (f) and (h) speaks in terms of questions raised, rather than of petitions filed, by labor organizations. An employer petition must allege that he has been presented with a claim by an individual or a labor organization for recognition as bargaining representative of his employees. The distinction which Congress intended to draw by the words 'raised by a labor organization' is, we believe, between a claim for recognition made by a union and a similar claim by an individual or in-

dividuals, not between a union petition and an employer petition filed with the Board. * * *

"* * * *We believe* * * * *that the exclusion of non-complying unions from the ballot in cases where employers are the petitioners is more nearly consistent with the supervening policy of denying the imprimatur of Government to such labor organization.*' To this same effect are the later decisions in Staten Island Cleaners, Inc., 93 NLRB 63; and the Federal Refractories Corp., 100 NLRB 35. (All emphasis has been supplied)." (R. 77-79).

In any determination as to whether the federal Act has excluded state action it is pertinent to inquire into the remedies afforded by the federal Act. *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, 98 L. Ed. 1025, 74 S. Ct. 833. **A union which refuses to comply with the filing requirements of the Act may not compel recognition.** This much is clear. Petitioners themselves agree that they cannot utilize the services of the Board, but must resort to "self-help", *i. e.*, the picket line. It is submitted that, insofar as bargaining rights arising out of the demand for recognition in this case are concerned, this union has forever removed itself from the protection of the Act. This is true even should the union, at this late date, have a change of heart and comply with the will of Congress by meeting the requirements of Section 9 (f) (g) and (h). An employer faced with the demand for recognition may insist upon a Board election and Board certification prior to recognition of the union so long as his insistence upon a Board election certification are not in

bad faith—and objective tests are used in the determination of bad faith, that is, the commission of unfair labor practices. **We are aware of no case where the employer was found guilty of a refusal to bargain because of his insistence upon Board certification, and since the amendments to the Act, upon an election, where the Board did not also find unfair labor practices, independent of the refusal to bargain, as evidence of the employer's bad faith.** The most recent expression of the Board is found in *Sunset Lumber Products*, 113 NLRB No. 115 (1955), 36 LRRM 1426, where it was said:

> "The Trial Examiner, viewing the foregoing facts, concluded that the Respondent's refusal to recognize the Union and discuss the provisions of a collective bargaining agreement or arrange to meet for such a purpose was not motivated by a good faith doubt as to the Union's majority status. We cannot agree with the Trial Examiner that the Respondent unlawfully refused to bargain with the Union. As the Board has previously stated, ordinarily an employer faced with the demand for recognition by a labor organization which claims to represent a majority of his employees may refuse to rely upon evidence of the union's representation and insist that the union establish its majority by means of a Board conducted secret election.[5] But when, as stated in the Joy Silk Mills case,[6] 'such refusal is due to a desire to gain time and to take action to dissipate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain set forth in Section 8 (a) (5) of the Act.' Whether an employer's

refusal to bargain is impelled by a good or bad faith doubt as to the union's majority status can only be tested by reference to the total picture of the employer's conduct revealed by the record as a whole.

"When the General Counsel introduced evidence that the Union represented a majority of the employees in an appropriate unit, that it requested recognition, and that this request was declined, and the Respondent came forth, as it did, with evidence establishing that its refusal to grant recognition was founded on its desire that the Union first establish its majority before this Board, the ultimate burden of proving that the refusal was motivated by bad faith remained for the General Counsel to sustain. The burden of proving its bona fides did not shift to the Respondent. This burden could be met by the General Counsel through the introduction of evidence that 'all the circumstances of (this) case, including the (Respondent's) background, the 'character or extent' of the unfair labor practices, and the sequence of events' demonstrated the Respondent's bad faith motivation in refusing to bargain with the Union. However, on the state of the record before us, we are not persuaded that that burden has been successfully borne. * * *"

And in *A. L. Gilbert Company*, 110 NLRB 2067, 35 LRRM 1314 (1954), the Board made it clear that an employer, who had no doubt that his employees had actually signed an authorization designating the union as a representative, might still insist upon an election so that his em-

ployees might express their views in secret, so long as he committed no serious unfair labor practices in connection with his insistence upon an election.

In holding to this view the Board is following the decisions of the Courts of Appeal. In *National Labor Relations Board v. Jackson Press, Inc.*, 201 F. (2d) 541, 544, (7th Cir., 1953), the Court summarized the state of the law at that time:

> "When an employer is faced with a demand for recognition by a union, it may in good faith withhold recognition until the union's representation claims are established by a Board conducted election. N. L. R. B. v. Chicago Apparatus Co., 7 Cir., 116 F. (2d) 753, 758; North Electric Mfg. Co. v. N. L. R. B., 6 Cir., 123 F. (2d) 887, 889; Joy Silk Mills, Inc., v. N. L. R. B., 87 U. S. App., D. C. 360, 185 F. (2d) 732. However, such refusal of, or delay in, recognition may not be for the purpose of gaining time in which to undermine the union or to dissipate its claimed majority. N. L. R. B. v. Federbusch Co., Inc., 2 Cir., 121 F. (2d) 954. A refusal to bargain inspired by such a purpose is not in good faith and is a violation of Sec. 8 (a) (5) of the Act."

In *Ohio Ferro-Alloys Corp. v. National Labor Relations Board*, 213 F. (2d) 646, (6th Cir., 1954), the Court, in recognizing that the strike of the non-complying United Mine Workers was an unprotected activity, pointed out, under the circumstances of that case, that the company was under no duty to recognize the union prior to a Board determination of majority status. The Circuit

of such employees whom such employer is required to recognize under this Act;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed. 61 Stat. 140, 65 Stat. 601, 29 U.S.C., Section 158 (b).

Section 9 (c):

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

Court cases cited by petitioner from page 24 through page 27 hold that where an employer's insistence upon a certification is not *bona fide*, as shown by its unfair labor practices, then a duty to bargain exists. These cases are not at variance with the cases cited above. In each of them the company provided evidence of its rejection of the principle of collective bargaining by the commission of unfair labor practices. In the instant case there is no suggestion that the employer committed any act denounced by the National Labor Relations Act as an unfair labor practice, or that it refused to recognize petitioners for any other reason than that petitioners were not in compliance and had not been properly certified and accredited by the National Labor Relations Board. The union representative, James L. Ledbetter, testified that he made a demand upon respondent's representative, Mr. Fowler, and "he told me that we wasn't recognized by the National Labor Relations Board and that he didn't recognize us either". (R. 53). Fowler confirms this. (R. 58). Unquestionably, as found by the Court below, both Fowler and Ledbetter were referring to the well known fact that the United Mine Workers had publicly refused to comply with the filing requirements of the Act.

Initially the Board held that there was no obligation whatsoever, regardless of motive, for an employer to comply with the request to bargain made by a non-complying union, and such an employer could not be found guilty of refusal to bargain with such an organization regardless of whether the refusal was made in good or bad faith. *Matter of Andrews Company*, 87 NLRB 379 (1949). However, this decision met with the disapproval of the Court of Appeal for the District of Columbia in

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10 (c).

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

West Texas Utilities Company v. N. L. R. B., 184 F. (2d) 233 (C. A., D. C., 1950). The Board modified its practice in accordance with this decision and announced the change in the *Matter of New Jersey Carpet Mills, Inc.*, 92 NLRB 604 (1950). Under the Board's present rule an employer may, regardless of any other motives he may have, defer recognition of a non-complying union until such time as it complies, **so long as the employer gives non-compliance as one of the reasons for the failure to accord recognition.** The Board's conclusions in this regard have been summarized at page 612 of the *New Jersey Carpet Mills, Inc.* opinion:

> "We therefore disagree with our colleagues' view that the fact of actual compliance at the time of the employer's refusal to bargain should be the criterion by which the existence of a violation should be tested. Where, as here, the Employer's own action in refusing to bargain was based when it occurred entirely on other grounds, themselves, unlawful, the unasserted and purely coincidental fact of the Union's non-compliance cannot entitle the Employer to a windfall or immunize it against the Board's finding a violation of the Act, once the Union's later compliance frees us to inquire. In such cases a union's non-compliance is an afterthought, which could not have motivated the employer's original refusal and does not bear upon its good faith at that time.
>
> "However, in the interest of effectuating the policies of the Act, **Chairman Herzog** would not go to the other extreme and hold that every refusal to bargain with a non-complying union is a violation,

even though the court's opinion in the West Texas Utilities case suggests that the Board might freely do so.[20] Where an employer contemporaneously notifies a labor organization that the latter's non-compliance is the reason for its refusal to negotiate, and the facts disclose that the union was indeed not in compliance at the time, the Chairman believes that congressional policy of encouraging compliance should require this Board to view the situation in a different light and find no violation. For then, in his opinion, realism should oblige the Board to recognize not only that the employer's position may well be consistent with a good-faith recognition of the basic principle of collective bargaining, but that its very assertion will tend to encourage early union compliance with Section 9 (f), (g), and (h). As was said in the dissenting opinion in the Andrews case, which goes as far as Chairman Herzog still believes the Board should go, this would result in practice in employers' 'calling their employees' attention to the non-compliance status of their representative. It would furnish an incentive to employees to require their representatives to comply, because by so doing they could achieve immediate recognition and bargaining, if necessary with the assistance of Board processes which they could then invoke."

Certainly the Board's rule and decision would serve to effectuate the object of Congress of bringing all unions into compliance with the provisions of Sections 9 (f) (g) and (h) of the Act, while the view urged by petitioners

here would serve to encourage rather than discourage compliance with those provisions.

The Circuit Courts have not disapproved of the Board's present position. In *National Labor Relations Board v. Reed & Prince Mfg. Co.*, 205 F. (2d) 131, cited at page 18 of petitioners' brief, the **Board** sought, in the Circuit Court of Appeals, to enforce its bargaining order against respondent company. The company sought to defend on the grounds that the union had not been in compliance at the time the bargaining request was made. In sustaining the Board's rejection of this defense the Court noted at page 133:

> "* * * it not infrequently happens that a union completely above suspicion of communist domination may fall temporarily out of compliance * * *"
> "* * * This objection was not taken at any time during the period of protracted negotiations between the company and the union; * * *"

And in a similar case, *NLRB v. Pecheur Lozenge Co., Inc.*, 209 F. (2d) 393, 402 (2nd Cir., 1953), cited at page 19 of petitioners' brief, the Court with Judge Medina as the organ of the Court said:

> "The refusal was based on grounds which were insufficient in the eyes of the law and **was not premised upon the Union's failure to comply with the requirements of that section** (the filing requirements). As we have seen, as late as November 28, 1949, Mrs. Pecheur told Balleisen that neither the Union's non-compliance with the filing requirements of the Act nor its 'pro-communistic' charac-

> ter 'would make (any) difference to her,' and that if the employees wanted the Union she was willing to bargain with it. **In these circumstances,** while failure to file the non-communist affidavits required by Section 9 (h), and the financial statement and other reports required by Section 9 (f) and (g), bars a union from access to the processes of the Board, it does not necessarily destroy the Union's status as bargaining representative for purposes of Section 8 (a) (5) * * *" (Emphasis supplied).

These cases, in which non-compliance at the time of the bargaining request was raised as an afterthought, are certainly not authority for the proposition that an employer, who refuses to bargain with a union **which as a matter of policy has refused to comply, for that reason,** is under any obligation to bargain with that union. To the contrary, the explicitness with which the Courts pointed out that the defense was an afterthought, and the union's non-compliance was only temporary, indicates that the Courts would have reached a different result had the union, at the time of the request, been pursuing non-compliance as a matter of policy.

The Supreme Court of Wisconsin, in *Faribault Daily News Incorporated v. International Typographical Union*, 230 Minn. 303, 53 N. W. (2d) 336, took, it is submitted, too limited a view of a state's right to proceed in a matter of this kind. Further, the Court's reasoning that the filing requirements were but a bar to certification, and, since certification was not a prerequisite to a recognition strike, did not take into account the com-

plexities of the problem which have been here detailed. The Court relied solely upon a decision which had been issued some seven years prior to the amendments requiring the non-communist affidavits and other filings.

It is respondent's position that regardless of whether **employees** who go on strike in support of a non-complying union's claim for recognition are protected from discharge and other retaliatory action by an employer, **the union,** for reasons hereinafter to be advanced, should not be given the protection of the Act. The Board's position as expressed in *Brookville Glove Company,* 114 NLRB No. 52, cited at page 30 of petitioners' brief should be examined in the light of *Hoover Co. v. N. L. R. B.,* 191 F. (2d) 380 (6th Cir., 1951); *N. L. R. B. v. Electronics Equipment Co.,* 194 F. (2d) 650 (2nd Cir., 1952); and *Ohio Ferro-Alloys Corp. v. National Labor Relations Board, supra.* These cases all hold that employees who go on strike in support of a recognition demand on the part of a non-complying union while a representation proceeding on behalf of another union is pending lose all protection of the Act. Should not the same rule apply where only one union is involved, but it has made proper determination of the question concerning representation impossible by refusing to submit itself to the Board's processes? In the one case the strike is outlawed because it must await the outcome of a representation proceeding brought by a complying union. In our case the strike should be outlawed because a proper determination of the question concerning representation cannot be made because of the non-compliance of the claiming union, although the Act contemplates that the employer may, in

good faith, either require Board certification, or invoke the Board's processes itself.[2]

However, it is not necessary to hold that employees who strike in support of a non-complying union's demand for recognition lose protection of the Act to hold that the union itself is not similarly protected. Any individual may be assured of the Act's protection by filing charges with the Board in his individual capacity. *N. L. R. B. v. Southern Furniture Mfg. Co.*, 194 F. (2d) 59 (5th Cir., 1952), Cert. denied, 343 U. S. 964, 96 L. Ed. 1361, 72 S. Ct. 1057; *N. L. R. B. v. Augusta Chemical Company*, 187 F. (2d) 63 (5th Cir., 1951); *N. L. R. B. v. Clausen*, 188 F. (2d) 439, (3rd Cir., 1951); *Brookville Glove Company, supra.* The Courts and the Board have denied relief under the Act where proceedings, though purportedly filed on an individual basis, were actually filed by an individual fronting for a non-complying labor organization. This demonstrates that the statutory scheme is designed to prevent any benefits of the Act flowing to the union as such. *N. L. R. B. v. Happ Bros., Inc.*, 196 F. (2d) 195 (5th Cir., 1952); *N. L. R. B. v. Alside*, 192 F. (2d) 678 (5th Cir., 1951); *White v. Douds*, 80 F. Supp. 402 (D. C., S. D. N. Y., 1948); *Timm Industries, Inc.*, 104 NLRB 359 (1953); *Woods Parts, Inc.*, 101 NLRB 445 (1952). Finally, it is submitted that the Court's decision in *N. L. R. B. v. Dant & Russell*, 344 U. S. 375, 382, 73 S. Ct. 375, 97 L. Ed. 407, 413 (1953) effectively disposes of any ar-

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[2] If proper recognition is accorded to the intent of Congress in adding to the rights protected by Section 7 the right to refrain from concerted activities, then a question of representation raised by one union must be placed in the same class as one raised by two unions. Instead of competition between groups of employees, each supporting a different union, there is competition between employees supporting a union, and those who wish to refrain from such support.

gument that a non-complying union, as such, is entitled to any protection whatsoever from the provisions of the National Labor Relations Act. There the Court said:

> "Phrased differently, the argument is that the benefits of the Act may not flow to a labor organization unless the non-Communist affidavits are on file. We agree with the argument, and believe that it is in accord with our interpretation of § 9 (h)."

The union here involved, as its petition for certiorari discloses, is committed to a policy of non-compliance, and complains principally that the decision below amounts to "a death sentence". (Petition for certiorari, page 17). In short, petitioner seeks protection of the Act, but is unwilling to comply with its provisions. If this be a "death sentence", then it is certainly self-inflicted, and could be avoided by simple compliance with law.

If a state has not the right to protect its employer citizens from irreparable injury caused by a recognition picket line thrown up by a union which refuses to permit lawful and orderly determination of the question of representation, then the employer is placed in a hopeless dilemma. Under ordinary circumstances, *i. e.*, when confronted by a recognition demand and bargaining request by a union in compliance with the Act, an employer may demand that the union seek certification under 29 U. S. C., 159 (c), or himself seek an election under that Section. So long as the employer's demand for an election is not made for the purpose of seeking delay in order to undermine the union his right to an election is held by the Board, with Court approval, to be absolute. Even should

it later develop that the union at the time it made its request was, in fact, the majority representative on the basis of signed cards there will be no finding of refusal to bargain where there is no demonstration of bad faith in seeking an election. *Sunset Lumber Products, supra; A. L. Gilbert Company, supra; National Labor Relations Board v. Jackson Press, Inc., supra.*

Thus a complying union can be forced to an election. *Matter of Herman Loewenstein, Inc.*, 75 N. L. R. B. 377. The petitioning union here, a non-complying union, seeks to be placed in a better position than a complying union. Surely Congress did not intend such a situation.

CONCLUSION.

Wherefore, respondent prays that the judgment of the Supreme Court of Louisiana be affirmed.

Respectfully submitted,

GROVE STAFFORD,
710 Guaranty Bank Building,
Alexandria, Louisiana;
JOHN L. PITTS,
710 Guaranty Bank Building,
Alexandria, Louisiana;
RICHARD C. KEENAN,
1113 Whitney Building,
New Orleans, Louisiana,
COUNSEL FOR RESPONDENT.

APPENDIX

Labor Management Relations Act of 1947

Section 7:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158 (a) (3) of this title. 61 Stat. 140, 29 U.S.C., Section 157.

Section 8 (a) (1):

(a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise in the rights guaranteed in section 157 of this title. 61 Stat. 140, 29 U. S. C., Section 158 (a) (1).

Section 8 (a) (3):

(a) It shall be an unfair labor practice for an employer—

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an

employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159 (f), (g), (h) of this title, and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement. Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. 61 Stat. 140; 65 Stat. 601, 29 U.S.C., Section 158 (a) (3).

Section 8 (a) (5):

(a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title. 61 Stat. 140, 65 Stat. 601, 29 U.S.C., Section 158 (a) (5).

Section 8 (b):

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling. 61 Stat. 143, 65 Stat. 601, 29 U.S.C., Section 159 (c).

Section 9 (f), (g) and (h):

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000.00 and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor; and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by

paragraph (1) hereof to be filed with the Secretary of Labor. 61 Stat. 143, 65 Stat. 601, 29 U.S.C., Section 159 (f).

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 160 of this title with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection. 61 Stat. 143, 65 Stat. 601, 29 U.S.C., Section 159 (g).

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a

member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of sections 286, 287, 1001, 1022 and 1023 of title 18 shall be applicable in respect to such affidavits. 61 Stat. 143, 65 Stat. 601, 29 U.S.C., 159 (h).

Section 10 (b) (Excerpt):

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. 61 Stat. 146, 62 Stat. 991, 29 U.S.C., Section 160 (b).

Section 303:

Sec. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling,

transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. 61 Stat. 158, 29 U.S.C., 187.